

BEFORE THE STATE AUDITOR AND COMMISSIONER OF INSURANCE
OF THE STATE OF MONTANA

In the matter of the amendment of)	NOTICE OF PUBLIC HEARING ON
ARM 6.6.2801, 6.6.2803, 6.6.2804,)	PROPOSED AMENDMENT,
6.6.2808, and 6.6.2809, the repeal)	REPEAL, AND ADOPTION
of ARM 6.6.2802, 6.6.2805,)	
6.6.2806, and 6.6.2807, and the)	
adoption of NEW RULE I pertaining)	
to Surplus Lines Insurance)	
Transactions)	

TO: All Concerned Persons

1. On August 21, 2009, at 10:00 a.m., the Commissioner of Insurance, Office of the State Auditor, Monica Lindeen, will hold a public hearing in the 2nd floor conference room of the State Auditor's Office, 840 Helena Ave., Helena, Montana, to consider the proposed amendment, adoption, and repeal of the above-stated rules.

2. The Commissioner of Insurance, Office of the State Auditor, Monica Lindeen, will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the department no later than 5:00 p.m., August 14, 2009, to advise us of the nature of the accommodation that you need. Please contact Darla Sautter, State Auditor's Office, 840 Helena Avenue, Helena, Montana, 59601; telephone (406) 444-2726; TDD (406) 444-3246; fax (406) 444-3497; or e-mail dsautter@mt.gov.

3. The rules as proposed to be amended provide as follows, stricken matter interlined, new matter underlined:

6.6.2801 PURPOSE AND SCOPE (1) remains the same.

~~(2) These rules provide for the establishment of and compulsory membership in a surplus lines advisory organization, hereinafter called the association, to process surplus lines insurance transactions; collect a stamping fee; maintain records for inspection by the commissioner; compile and disseminate lists of eligible surplus lines insurers and surplus lines coverages; and encourage compliance by surplus lines insurance producers with laws and rules concerning surplus lines insurance.~~

AUTH: 33-1-313, 33-2-316, MCA

IMP: 33-2-301, 33-2-302, 33-2-303, 33-2-304, 33-2-305, 33-2-306, 33-2-307, 33-2-308, 33-2-309, 33-2-310, 33-2-311, 33-2-312, 33-2-313, 33-2-314, 33-2-315, 33-2-316, 33-2-317, 33-2-321, through 33-2-326, MCA

6.6.2803 FILING OF SUBMISSIONS, EXAMINATION OF SUBMISSIONS AND RECORDS RETAINED (1) ~~The association is to examine each submission~~

from licensed Montana surplus lines producers to assure accuracy.

~~(2) With the exception of the annual statement required by 33-2-310, MCA, every~~ Every Montana licensed surplus lines producer shall submit to the association department all information required to be filed by 33-2-301, et seq., MCA, and these rules, or those sections of the operating manual compiled by the association which have been approved by the commissioner and distributed in compliance with ARM 6.6.2807. Such submissions shall be made by surplus lines insurance producers in the manner prescribed by the approved sections of the operating manual.

(2) Surplus lines submissions to the department shall be made by Montana-licensed surplus lines producers and shall be made in a manner and form approved by the commissioner. There is a standardized submission form available from the department. Submissions may be made by:

(a) sending paper submissions to the department; or

(b) electronically filing submissions via the surplus lines business portal via the department's web site.

(3) All such surplus lines submissions are to must be made by licensed Montana surplus lines producers to the association department on forms approved by the commissioner, and shall be submitted to the association within 30 working 60 calendar days of the effective date of the policy.

(4) Licensed Montana surplus lines producers shall submit the annual statement required by 33-2-310, MCA, and the premium tax required by 33-2-311, MCA, directly to the commissioner. All surplus lines submissions must be complete. Incomplete submissions will not be accepted by the department, and will be returned for correction and resubmission within the foregoing 60 calendar day deadline from the effective date of the policy. If the 60 calendar day deadline has passed when the incomplete submission is returned, the surplus lines insurance producer shall resubmit the corrected submission form within ten calendar days from the date the department rejected the incomplete submission.

(5) For electronically filed submissions, the producing insurance producer shall keep a true and correct copy of the paper submission form affidavit with the original signatures of the producing insurance producer and the notary regarding the diligent search and the information provided to the insured under 33-2-310, MCA. The producing insurance producer shall provide a true and correct copy of the notarized submission form affidavit to the surplus lines insurance producer. These records shall be retained by the producing insurance producer and the surplus lines insurance producer for five years after the issuance of the surplus lines insurance policy to which they relate and shall be subject to inspection by the department in accord with 33-2-310, MCA.

(6) Surplus lines insurance producers shall retain records of, and supporting documentation for, all inspection fees charged to insureds under 33-2-206, MCA, and any assessment, membership, or similar fee or charge to insureds to obtain surplus lines insurance if such assessment, membership, or similar fee or charge was payable separately by the insured in consideration of the policy.

AUTH: 33-1-313, 33-2-316, MCA

IMP: 33-2-301, 33-2-302, 33-2-303, 33-2-305, 33-2-306, 33-2-307, 33-2-308, 33-2-310, 33-2-311, 33-2-312, 33-2-313, 33-2-316, 33-2-321, through 33-2-326,

MCA

6.6.2804 COLLECTION OF STAMPING FEE (1) Pursuant to 33-2-321(5), MCA, the ~~association department~~ shall, ~~with the approval of the commissioner,~~ collect a stamping fee ~~equalling one percent of~~ on the base premium, including any monied endorsement, payable for each surplus lines insurance policy transacted by ~~its members in the state.~~

(2) The stamping fee is equal to:

(a) one percent of the base premium for paper (hard copy) submissions; and

(b) one-half percent of the base premium for electronically filed submissions via the surplus lines business portal via the department's web site;

(i) subsection (2)(b) will be effective January 1, 2010. Before January 1, 2010, any electronically filed submissions via the surplus lines business portal via the department's web site will be assessed a stamping fee of one percent of the base premium.

(3) Such stamping fee shall be earned in full as soon as any portion of the premium payable for the underlying policy is earned. The commissioner may, by rule, ~~reduce the percentage amount of the stamping fee whenever such reduction will not impair the association's ability to pay its expenses~~ set the stamping fee commensurate with the department's expenses for implementing the surplus lines insurance law, 33-2-301, et seq., MCA.

(2)(4) Because such stamping fee does not constitute "consideration for insurance" within the meaning of 33-15-102, MCA, and thus does not constitute part of the premium for surplus lines insurance, a surplus lines insurance producer may collect such stamping fee from the insured in addition to the premium payable in consideration for the insurance contract. Nothing in this ~~section~~ rule shall operate to exclude any other assessment, membership, ~~policy, survey,~~ inspection, ~~service~~ or similar fee or charge from the definition of "premium" contained in 33-15-102, MCA.

(3)(5) Both the base premium and the stamping fee of every policy of surplus lines insurance transacted in this state shall appear on the policy's declarations page and be clearly ~~labelled~~ disclosed as such.

(6) For paper (hard copy) submissions, the stamping fee information on the declarations page of the surplus lines insurance policy will disclose that the stamping fee would be less, and the percentage of the base premium to calculate the stamping fee, if the submission were filed electronically;

(i) section (6) will be effective January 1, 2010.

(7) For the purposes of collecting this stamping fee only, any ~~inspection fees or placement fees~~ assessment, membership, inspection, or similar fee or charge payable separately by the insured in consideration of the policy shall be excluded from calculations of the base premium. Designation of a base premium for purposes of calculating the stamping fee shall not operate to exclude from the definition of "premium" contained in 33-15-102, MCA, any assessment, ~~or~~ membership, ~~policy, survey,~~ inspection, ~~service~~ or similar fee or charge in consideration of that surplus lines insurance policy.

(4)(8) The ~~association must~~ department shall collect a penalty from any surplus lines insurance producer who does not pay the stamping fees ~~on each transaction within 30 days after the date on which the association bills the surplus~~

~~lines insurance producer for the stamping fee by April 1 for all transactions during the preceding year. Such penalty shall equal 25 percent of the amount initially overdue on each transaction plus 1.5 percent per month of the accumulated amount overdue on each transaction from the time of delinquency until the stamping fees are paid in full.~~

AUTH: 33-1-313, 33-2-316, MCA

IMP: 33-2-301, 33-2-302, 33-2-303, 33-2-305, 33-2-306, 33-2-307, 33-2-308, 33-2-310, 33-2-311, 33-2-312, 33-2-313, 33-2-316, 33-2-321, through 33-2-326,
MCA

6.6.2808 ELIGIBLE SURPLUS LINES INSURERS PUBLICATION AND DISTRIBUTION OF LIST (1) ~~The association shall publish and distribute to its members at~~ At least semiannually, the department shall make available a complete current list of eligible surplus lines insurers provided approved by the commissioner.

~~(2) The association shall publish and distribute to its members at least semiannually a complete current list, provided by the commissioner pursuant to ARM 6.6.2809 below, of the kinds of insurance which cannot be obtained from authorized insurers.~~

~~(3) The association shall produce for each of its members, in a form approved by the commissioner, an annual report complying with the requirements of 33-2-310(2), MCA, for a surplus lines insurance producer's annual statement. The association shall mail such annual reports to its members prior to March 1 of each year, for their review and submission to the commissioner. Nothing in this section or in the annual report prepared by the association shall relieve a surplus lines insurance producer from the duties imposed by 33-2-310, MCA, and 33-2-311, MCA.~~

AUTH: 33-1-313, 33-2-316, MCA

IMP: 33-2-301, 33-2-302, 33-2-303, 33-2-305, 33-2-306, 33-2-307, 33-2-308, 33-2-310, 33-2-311, 33-2-312, 33-2-313, 33-2-316, 33-2-321, through 33-2-326,
MCA

6.6.2809 APPROVED RISK LIST -- OF KINDS OF INSURANCE PRESUMED UNOBTAINABLE FROM AUTHORIZED INSURERS (1) At least semiannually, the commissioner shall make available a list of the kinds of insurance which are presumed to be unobtainable from authorized insurers, known as the approved risk list.

~~(2) The commissioner, in consultation with and the surplus lines insurance producer association domiciled in Montana, shall jointly appoint a five-member committee to compile a proposed approved risk list of the kinds of insurance which cannot be obtained from authorized insurers for consideration by the commissioner. Such~~ The committee shall meet at least semiannually and shall consist of four Montana-licensed surplus lines insurance producers and one staff member of the department of insurance, each serving until replaced by the commissioner.

~~(2)(3) The committee shall meet at least semiannually, in person or by teleconference, and shall make reasonable efforts to verify that the kinds of insurance risks included on its proposed approved risk list cannot be obtained from~~

authorized insurers, ~~and the commissioner may add or delete kinds of insurance from the list submitted by the committee for his approval.~~

(3)(4) The committee shall submit a new proposed approved risk list to the commissioner for her approval on or before December 1 and June 1 of each year, and once approved the list shall be effective for the immediately following period January 1 through June 30, or July 1 through December 31, respectively. At the commissioner's request, the committee shall submit a new proposed approved risk list in addition to the regularly scheduled semiannual lists, and once approved such additional list shall be effective for the remainder of the period January 1 through June 30, or July 1 through December 31, within which it was approved. The commissioner may add or delete risks from the proposed approved risk list submitted by the committee. Unless the commissioner expressly disapproves or alters the proposed approved risk list within 30 days after its submission, it shall be deemed approved.

(4) remains the same, but is renumbered (5).

AUTH: 33-1-313, 33-2-316, MCA

IMP: 33-2-301, 33-2-302, 33-2-303, 33-2-305, 33-2-306, 33-2-308, 33-2-310, 33-2-311, 33-2-312, 33-2-313, 33-2-316, 33-2-321, through 33-2-326, MCA

4. The department proposes to repeal the following rules:

6.6.2802 DELEGATION OF AUTHORITY, is found at page 6-257 of the Administrative Rules of Montana.

AUTH: 33-1-313, 33-2-316, MCA

IMP: 33-2-301 through 33-2-326, MCA

6.6.2805 ORGANIZATION AND DUTIES OF SURPLUS LINES ADVISORY ORGANIZATION, is found at page 6-257.1 of the Administrative Rules of Montana.

AUTH: 33-1-313, 33-2-316, MCA

IMP: 33-2-301 through 33-2-326, MCA

6.6.2806 OPERATING EXPENSES, is found at page 6-257.2 of the Administrative Rules of Montana.

AUTH: 33-1-313, 33-2-316, MCA

IMP: 33-2-301 through 33-2-326, MCA

6.6.2807 MEMBERSHIP IN SURPLUS LINES ADVISORY ORGANIZATION, is found at page 6-257.2 of the Administrative Rules of Montana.

AUTH: 33-1-313, 33-2-316, MCA

IMP: 33-2-301 through 33-2-326, MCA

5. The rule proposed to be adopted provides as follows:

NEW RULE I ANNUAL STATEMENT (1) The department shall produce for each surplus lines insurance producer, in a form approved by the commissioner, an annual report complying with the requirements of 33-2-310(2), MCA, for a surplus lines insurance producer's annual statement. The department shall distribute such annual reports to surplus lines insurance producers prior to March 1 of each year for their review and submission to the commissioner. Nothing in this section or in the annual report prepared by the department shall relieve a surplus lines insurance producer from the duties imposed by 33-2-310, MCA, and 33-2-311, MCA.

AUTH: 33-1-313, 33-2-316, MCA

IMP: 33-2-301, 33-2-302, 33-2-303, 33-2-305, 33-2-306, 33-2-307, 33-2-308, 33-2-310, 33-2-311, 33-2-312, 33-2-313, 33-2-315, 33-2-316, 33-2-321, MCA

6. STATEMENT OF REASONABLE NECESSITY: The Commissioner of Securities and Insurance - Office of the State Auditor, Monica J. Lindeen, has determined the department will be resuming the surplus lines insurance stamping office functions under the surplus lines insurance law at 33-2-301, et seq., MCA. The department will be directly reviewing and processing surplus lines insurance submissions, determining applicable stamping fees, and sending surplus lines insurance producer annual statements for premium taxes and stamping fees owed.

The department's direct review and processing of surplus lines insurance submission forms and planned implementation of an electronic filing system for surplus lines insurance submission forms with the department should increase efficiency for surplus lines insurance producers in filing. Additionally, direct review and processing of submissions will help the department to better regulate the surplus lines industry, be more responsive to any problems, and to more efficiently and accurately assess and collect surplus lines insurance premium taxes and any applicable penalties.

The Commissioner also considered the growing movement, supported by the insurance industry, to standardize regulation of multi-state surplus lines insurance policies including the effect of possible federal legislation, such as the Nonadmitted and Reinsurance Reform Act of 2009, S. 1363, 111th Congress, 1st Sess. (2009), and the nearly identical version in the House of Representatives, H.R. 2571, 111th Congress, 1st Sess. (2009). (In 2007, a similar bill was introduced in the Senate, but no action was taken prior to the end of the 110th Congress, requiring that the bill be reintroduced in the 111th Congress.) Also, possible interstate agreements, such as Surplus Lines Insurance Multi-State Compliance Compact (SLIMPACT), are being developed to meet the requirements of the Nonadmitted and Reinsurance Reform Act of 2009.

Generally, these efforts to standardize multi-state surplus lines insurance policies would require surplus lines insurance regulatory and tax filings in only one state – either the home state of the insured, or the home state of the surplus lines insurance producer – which is expected to decrease the filings made and the

stamping fees and premium taxes collected in Montana. The surplus lines insurance stamping fees fund the surplus lines insurance stamping office functions in Montana. The department anticipates that standardized regulation of multi-state surplus lines policies will come to fruition, resulting in decreased filings and revenue in Montana, and ultimately necessitating the department's resumption of the stamping office functions. By resuming the stamping office functions and implementing an electronic filing system, the department should be well-positioned for the future.

Accordingly, rules delegating authority to the surplus lines advisory organization to operate the surplus lines stamping office and pertaining to the operations of the stamping office must be repealed or amended to reflect the department's resumption of the stamping office functions.

With regard to ARM 6.6.2801, the department proposes to delete (2) regarding the surplus lines advisory organization, or association, the compulsory membership in the association, and the obligations of the association in operating the surplus lines stamping office. Resumption of the stamping office functions by the department makes it reasonably necessary to delete (2).

The department proposes repealing ARM 6.6.2802, 6.6.2805, 6.6.2806, and 6.6.2807. ARM 6.6.2802 delegated authority to the surplus lines advisory organization, or association, to operate the surplus lines insurance stamping office. ARM 6.6.2805 required the association to obtain the commissioner's approval of its articles, by-laws, and procedures and concerned the association's obligations in operating the stamping office. ARM 6.6.2806 pertained to the association's expenses for operating the stamping office. ARM 6.6.2807 required all surplus lines insurance producers to be members in the association, but prohibited the association from charging any membership fees. ARM 6.6.2807 also required the association to develop an operating manual and stamp and, after approval by the commissioner, distribute these to all surplus lines insurance producers and to make a current membership list available. Resumption of the stamping office functions by the department makes it reasonably necessary to repeal these rules.

The department proposes amending ARM 6.6.2803 to address the filing of surplus lines insurance submissions with the department, the department's examination of the submissions, and the records to be retained by surplus lines insurance producers and producing insurance producers. The department anticipates implementing an electronic filing system for surplus lines insurance submissions via the surplus lines business portal via the department's web site.

Surplus lines insurance producers are responsible for correctly completing and timely filing surplus lines insurance submissions. It is reasonably necessary to amend ARM 6.6.2803 to require that submissions be filed with the department and to reflect that paper and electronic submissions may be made.

It is also reasonably necessary to amend the number of days in subsection (3) of ARM 6.6.2803 that surplus lines producers have to file submissions from 30

working days to 60 calendar days to bring more clarity to the submission deadline which should make it easier for surplus lines insurance producers to comply, and for the department to administer. (Further, in a previous review by the department, a sampling of surplus lines submission forms showed that the majority of surplus lines insurance producers do file the submission forms within 60 calendar days from the effective date of the policy.) Additionally, it is reasonably necessary to amend ARM 6.6.2803 to provide that incomplete submissions will be returned to the surplus lines insurance producer for correction and resubmission within 60 calendar days from the effective date of the policy or, if 60 days have already passed, within ten calendar days from the date the department rejected the submission.

Section 33-2-310, MCA, requires that producing insurance producers sign an affidavit attesting to their diligent search and the information provided to insureds regarding the placement of the risk in the nonadmitted market. The surplus lines insurance submission form includes this affidavit, but the electronic filing system will be interactive and will not accommodate a notarized affidavit. Therefore, in order to fulfill 33-2-310, MCA, with regard to electronically filed submissions, it is reasonably necessary to amend ARM 6.6.2803 to require producing insurance producers to retain a true and correct copy of the notarized surplus lines insurance submission form and to provide a true and correct copy of the same to the surplus lines insurance producer.

It is also reasonably necessary to amend ARM 6.6.2803 to clarify that surplus lines insurance producers must retain records of any inspection fee charged and any assessment, membership, or similar fee or charge to insureds to obtain surplus lines insurance. These records are necessary for the department to determine surplus lines insurance producer compliance with 33-2-306, MCA, regarding inspection fees, and also to determine the stamping fees and premium taxes owed.

It is reasonably necessary to amend ARM 6.6.2804 to reflect the resumption of the stamping office functions by the department and to provide that the stamping fee collected by the department be commensurate with its expenses to implement the surplus lines insurance law and carry out the surplus lines stamping office functions. The department anticipates that the electronic filing system will decrease the staff time to review and process submissions resulting in lower costs to the department making it reasonably necessary to amend the rule to provide for a lower stamping fee for electronically filed submissions.

Further, it is reasonably necessary to amend ARM 6.6.2804 to provide for annual collection of stamping fees. By collecting stamping fees annually, the department could simplify the process for both surplus lines insurance producers and the department by collecting the stamping fees at the same time it collects premiums taxes, and including both on one statement distributed to surplus lines insurance producers.

For clarity, it is reasonably necessary to amend ARM 6.6.2808 and 6.6.2809 to separate out the documents to be developed by the department, and approved by

the commissioner, into different rules regarding the information to be contained in each kind of document. The department proposes amending ARM 6.6.2808 to address only the eligible surplus lines insurers list. Section (2) of ARM 6.6.2808 would be deleted, but is substantially included in amended ARM 6.6.2809 regarding the approved risk list. Section (3) of ARM 6.6.2808 would be deleted, but is substantially included in proposed New Rule I regarding annual statements for stamping fees and premium taxes owed.

It is also reasonably necessary to amend ARM 6.6.2809 to make the Commissioner solely responsible for appointing a five-member committee to compile a proposed approved risk list for consideration because the delegation of authority to the association in ARM 6.6.2802 will be repealed. Under the amendments, the Commissioner would consult the surplus lines agents' association domiciled in Montana regarding possible appointees to the committee.

It is also reasonably necessary to promulgate New Rule I regarding the surplus lines insurance producer annual statements. New Rule I would reflect the preparation of the statements by the department instead of the association. New Rule I would also simplify the collection of the stamping fees for both surplus lines insurance producers and the department by changing from monthly to an annual collection and including both the stamping fees and the premium taxes owed on one statement distributed to surplus lines insurance producers.

7. Concerned persons may submit their data, views, or arguments concerning the proposed actions either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to Jennifer Massman, Staff Attorney, Commissioner of Securities and Insurance, Office of the State Auditor, Monica Lindeen, 840 Helena Ave., Helena, Montana, 59601; telephone (406) 444-2040; fax (406) 444-3497; or e-mail jmassman@mt.gov, and must be received no later than 5:00 p.m., August 31, 2009.

8. Jennifer Massman, Staff Attorney, has been designated to preside over and conduct this hearing.

9. The department maintains a list of concerned persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Such written request may be mailed or delivered to Darla Sautter, State Auditor's Office, 840 Helena Ave., Helena, Montana, 59601; telephone (406) 444-2726; fax (406) 444-3497; or e-mail dsautter@mt.gov or may be made by completing a request form at any rules hearing held by the department.

10. An electronic copy of this Proposal Notice is available through the Secretary of State's web site at <http://sos.mt.gov/ARM/Register>. The Secretary of State strives to make the electronic copy of the Notice conform to the official

version of the Notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the Notice and the electronic version of the Notice, only the official printed text will be considered. In addition, although the Secretary of State works to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

11. The bill sponsor contact requirements of 2-4-302, MCA do not apply.

/s/ Christina L. Goe
Christina L. Goe
Rule Reviewer

/s/ Robert W. Moon
Robert W. Moon
Deputy Insurance Commissioner

Certified to the Secretary of State July 20, 2009.